

**Date: 20080502**

**Docket: IMM-4243-07**

**Citation: 2008 FC 564**

**Ottawa, Ontario, May 2, 2008**

**PRESENT: The Honourable Mr. Justice Kelen**

**BETWEEN:**

**AGHA SHABBAR MUSTAFA  
a.k.a. SHABBAR MUSTAFA AGHA**

**Applicant**

**and**

**THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review of a decision of visa officer Syed Abdul Hameed at the Canadian High Commission in Islamabad, Pakistan dated August 16, 2007 refusing the applicant's application for permanent residence as an overseas dependant of an in-Canada applicant for permanent residence. This case involves the genuineness of an arranged marriage where the couple has never met in person.

## **FACTS**

[2] The applicant is a 33-year-old citizen of Pakistan. On August 26, 2006, he married Bushra Kazmi, who had been granted refugee protection in Canada in June 2005. The couple's marriage took place over the telephone with the applicant in Pakistan and Ms. Kazmi in Canada. Their marriage certificate was signed at that time. Despite their marriage taking place over one and a half years ago, the applicant and his spouse have yet to meet face-to-face.

### **The applicant's relationship with his spouse**

[3] The applicant's wife was previously married and is the mother of a young child. She and her former spouse were married in 2000, but experienced marital problems sometime before Ms. Kazmi left Pakistan in 2002. They were legally divorced in December 2005.

[4] The applicant and his wife became aware of one another through mutual acquaintances while Ms. Kazmi's family was in the process of finding her another husband. Members of the two families met and discussed the possibility of marriage, and the applicant and Ms. Kazmi began corresponding via telephone and e-mail and decided to marry by telephone with the applicant in Pakistan and Ms. Kazmi in Canada.

[5] The applicant states that he was aware of his spouse's previous marriage and the fact that she had a young son, but that those facts did not concern him since his own parents had been divorced many years earlier.

[6] After their marriage in August 2006, the applicant's wife informed Citizenship and Immigration Canada of her change of marital status and was advised that she could include the applicant in her application for permanent residence as a member of the family class. Accordingly, in February 2007, the applicant submitted an application for permanent residence at the Canadian High Commission in Islamabad.

[7] On August 8, 2007, the applicant attended an interview at the Canadian High Commission, wherein he was asked a number of questions regarding his relationship with Ms. Kazmi. The interview was conducted by visa officer Syed Abdul Hameed.

**Decision under review**

[8] By letter dated August 16, 2007, the applicant was notified that his application for permanent residence had been refused on account of the fact that there was "not much credible evidence of contact" between the applicant and his wife. As visa officer Hameed stated:

You and your spouse (Head of Family) are married only on papers and the marriage has not yet been consummated. You and your spouse have not yet met in person. Your spouse has previously been married and has a seven year old son from her previous relationship. There is not much credible evidence of contact between you and your spouse. I am not satisfied that the relationship between you and your spouse is not a bad-faith relationship.

[...]

I am satisfied that you do not meet the requirements for [a] permanent resident visa as a family member of Bushra Kazmi. I am therefore, refusing your application pursuant to section 11(1) of the Immigration and Refugee Protection Act.

[9] On October 15, 2007, the applicant filed this application for leave and judicial review of the visa officer's decision.

## ISSUE

[10] The issue to be considered in this application is whether the visa officer erred in concluding that the applicant was not a member of the family class because his marriage was not genuine.

## STANDARD OF REVIEW

[11] The issue before the Court concerns whether the visa officer erred in concluding that the applicant's marriage was not made in good faith. In *Rosa v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 117, [2007] F.C.J. No. 152 (QL), Mr. Justice Barnes considered the appropriate standard of review to apply to such a decision, stating at paragraph 23:

¶ 23 The determination of whether a marriage is genuine is essentially a fact-based inquiry. Here the Board noted that such a decision requires consideration of many factors including the length of any prior relationship or cohabitation between the parties, their knowledge of one another's histories, their behaviour together, the details of their engagement and the marriage ceremony, the frequency and substance of their communications while apart and the level of their financial dependence. These are all matters which require the sorting and weighing of evidence and the assessment of credibility -- a process which the Board is well situated to carry out. I accept that the applicable standard of review for such matters is patent unreasonableness: see *Canada (Minister of Citizenship and Immigration) v. Navarrete*, [2006] F.C.J. No. 878, 2006 FC 691 and the cases cited therein at para. 17.

[12] However, in light of the recent Supreme Court of Canada decision in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9 (QL), the standard of patent unreasonableness has now been eliminated, and courts conducting a standard of review analysis now focus on two standards: correctness and reasonableness. The jurisprudence is that determinations of whether a marriage is genuine is purely a question of fact entitled to the highest level of curial deference: see *Khella v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1357, 58 Imm. L.R. (3d) 15 per de Montigny J. at paragraph 12.

[13] The grant of deference supports a reasonableness standard of review and implies, as the Court held at paragraph 49 of *Dunsmuir*, that courts will give “due consideration to the determinations of decision makers” when reaching a conclusion. While the decision in *Rosa*, above, was made in the context of a decision of the Immigration Appeal Division of the Immigration and Refugee Board, the same considerations are at play when considering whether a visa officer erred in finding that a marriage was not made in good faith. Accordingly, the visa officer’s decision in the case at bar will be reviewed on a standard of reasonableness.

## **RELEVANT LEGISLATION**

[14] An application for permanent residence as a member of the family class may be denied based on section 4 of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227, which states:

**4.** For the purposes of these Regulations, a foreign national shall not be considered a spouse, a common-law partner, a conjugal partner or an adopted child of a person if the marriage, common-law partnership, conjugal

**4.** Pour l’application du présent règlement, l’étranger n’est pas considéré comme étant l’époux, le conjoint de fait, le partenaire conjugal ou l’enfant adoptif d’une personne si le mariage, la relation des conjoints de fait ou des

partnership or adoption is not genuine and was entered into primarily for the purpose of acquiring any status or privilege under the Act.

partenaires conjugaux ou l'adoption n'est pas authentique et vise principalement l'acquisition d'un statut ou d'un privilège aux termes de la Loi.

## ANALYSIS

**Issue: Did the visa officer err in concluding that the applicant was not a member of the family class because his marriage was not genuine?**

[15] The applicant submits that the visa officer's decision provided three reasons why the applicant did not meet the requirements for permanent residence as a member of the family class.

Those reasons are:

1. the marriage had not yet been consummated and the applicant and his wife had not yet met in person;
2. the applicant's wife was previously married and has a seven-year-old son; and
3. there was not much "credible evidence of contact" between the applicant and his wife.

[16] However, the applicant argues that the visa officer:

1. failed to provide any reasons why his wife's previous marriage was relevant to a finding that the applicant's marriage was not genuine;
2. failed to consider the applicant's explanation as to why he and his wife have not yet met in person or consummated their marriage; and
3. failed to give the applicant an adequate opportunity to respond to the visa officer's concerns about the lack of evidence of contact between him and his wife.

Each of these matters will be considered in turn.

### **Ms. Kazmi's previous marriage**

[17] In addition to the reasons provided to the applicant in the letter dated August 16, 2007, the visa officer's reasons for decision are also encompassed within the visa officer's notes generated through the Computer Assisted Immigration Processing System (the CAIPS notes). In the case at bar, the notes made by the visa officer stated that the applicant would be interviewed "to address the

relationship and compatibility factors” because of Ms. Kazmi’s previous marriage. The CAIPS notes then record the results of the interview as follows:

FN [the applicant] says that he does not have original divorce docs for HOF’s [Ms. Kazmi’s] previous marriage, says that he does not [know] about the details of HOF’s previous marriage, says that he never asked for details, says that he does not know if HOF’s former spouse is in pakistan, US or in canada, says that he does not know where divorce took place between HOF and her former spouse, says that he only knows that the divorce cert was issued from karachi-pakistan, says that he was told that HOF’s former spouse was a bit offensive to HOF.

says that his mother’s friend had know HOF’s family, his mother arranged his relationship with HOF, says that he does not have a specific reason for marrying HOF except that his mother was looking for a match for him and when his mother’s friend told his mother about HOF, his mother and himself agreed for the wedding, says that his mother has not yet met with HOF in person, says that his mother was told by her friend that HOF is good and will be a good match for her son (FN).

says that he has not yet met HOF in person.

says that he knows that HOF has a son from her previous relationship and her son lives with her in canada.

says that HOF’s son is approx 7 yrs old.

says that he does not know about HOF’s date of birth.

says that he does not have any evidence of contact to submit, says that HOF sent him a couple of photos but he does not have envelops for those photos.

conclusion: FN and HOF are married only on papers, FN and HOF have not yet met in person, HOF has previously been married and has a 7-yr old son from her previous marriage. There is not much credible evidence of contact between FN and HOF. I am not satisfied that the relationship between FN and HOF is not a bad-faith relationship. ...

[18] In reading the decision letter and CAIPS notes together, it is clear that Ms. Kazmi’s previous marriage flagged the visa officer’s concern that the applicant’s marriage may not be genuine.

[19] The respondent states that the relevance of Ms. Kazmi's previous marriage is explained within the visa officer's Affidavit, filed on December 5, 2007. In the Affidavit, the visa officer states at paragraphs 7-8:

¶ 7 One of the issues that I raised during the interview was the extent to which the Applicant and his sponsor had an understanding and an awareness of each other's circumstances. I was concerned that neither the Applicant, nor his mother, who apparently was looking for a spouse for him, had personally met or knew of the HOF. In local culture, where there are previous relationships / children involved, second marriages do take place, but only when there are compassionate circumstances at play. For example, where the two potential spouses come from the same extended family or where the respective families for both persons are close friends. In those situations, it is not unheard of that people will get married, but even in the situation the two people would discuss issues like child care and who will financially support the child. It is expected, however, that the previously unmarried spouse would want to know the details of why the other partner's marital relationship ended.

¶ 8 None of those factors were present in the Applicant's case. For example, the Applicant displayed little knowledge about his spouse's previous marital relationship. He states that he did not ask her for details about her former spouse. The applicant did not even know his spouse's date of birth. In addition, he and his spouse were married through proxy and, consequently, the marriage has not been consummated.

[20] In reading the decision as a whole, the above-mentioned rationale is not relevant to the ultimate decision, only to the reason why the visa officer interviewed the applicant to assess the applicant's true relationship and compatibility with his wife, i.e. whether there was a genuine marriage. Accordingly, I conclude that the affidavit elaborates with background, but does not provide a late explanation for the decision. If it did, I would have concluded that the visa officer failed to provide the applicant with adequate reasons for rejecting his application.



**Failure to consider the applicant's explanation**

[21] Among the visa officer's reasons for refusing the applicant's application was that he and his wife had never met in person or consummated their marriage. Accordingly, the visa officer noted that they were only married on paper and that this was not sufficient to establish that the marriage was made in good faith. The applicant, however, deposes in his Affidavit that when asked why he and his wife had never met in person, he stated that it was because his wife had claimed refugee protection against Pakistan and, accordingly, was unable to return for either the marriage or thereafter. Further, the applicant states that this information would have been known to the visa officer given the fact that his wife was a Convention refugee and applied for permanent residence in Canada as a "Protected Person."

[22] However, nowhere in the decision letter or CAIPS notes does the visa officer account for this fact in reaching a decision. Rather, the visa officer appears to wholly ignore Ms. Kazmi's protected status in basing his decision, at least in part, on the fact that the applicant and his wife have never met in person or consummated their marriage. In fact, the visa officer even mentions this fact in his Affidavit, stating at paragraph 8 that the applicant "and his spouse were married through proxy and, consequently, the marriage had not been consummated."

[23] It is relevant and important evidence that Ms. Kazmi cannot return to Pakistan on account of the fact that she left the country for reason of persecution, and the applicant cannot come to Canada without a valid visa. This is why they did not meet in person or visit one another. However, at no point does the visa officer account for these facts in the refusal letter or the CAIPS notes. Rather, the

visa officer comes to the direct opposite conclusion by relying on the lack of contact as one of his reasons why the marriage was not genuine. Accordingly, the Court finds that the visa officer's reliance on the fact that the applicant and his wife have not yet met in person or consummated their marriage was unreasonable since it was made without regard to the evidence before him. Moreover, the visa officer breached his duty to explain this relevant and important evidence. The Court must infer that the silence on this evidence means the decision was made without regard to this evidence. This is an unreasonable decision.

**Opportunity to respond to concerns**

[24] The applicant submits that the visa officer erred in failing to provide him with an opportunity to respond to concerns that he failed to proffer adequate evidence of ongoing contact in order to establish that his marriage was genuine. The applicant states in his Affidavit, dated October 23, 2007, that while he brought a number of greeting cards and pictures to the interview, he failed to bring letters and e-mails that he and his wife had written to one another. The applicant argues that had the visa officer made his concerns known at the interview, then the applicant would have requested the ability to forward the letters and e-mails to the visa officer thereafter.

[25] In the CAIPS notes, the visa officer states that the greeting cards and pictures were given no weight because the applicant failed to submit envelopes with them, thereby meaning that it was impossible to determine when each was sent or if they were sent together. At no point do the CAIPS notes reflect that the applicant mentioned he possessed further evidence of contact.

[26] The onus of establishing the *bona fides* of a marriage lies with the applicant. As Mr. Justice Evans, then sitting as a Federal Court judge, stated in *Madan v. Canada (Minister of Citizenship and Immigration)* (1999), 172 F.T.R. 262 at paragraph 6, visa officers must base their decisions on the information provided to them by the applicant:

¶ 6 It is well established that it is the responsibility of a visa applicant to put before the officer all the material necessary for a favourable decision to be made. Hence, visa officers are under no general legal duty to ask for clarification or for additional information before rejecting a visa application on the ground that the material submitted was insufficient to satisfy the officer that the applicant had met the relevant selection criteria.

Accordingly, the onus was on the applicant to provide the visa officer with whatever relevant evidence of contact was in his possession, and the visa officer was under no obligation to make further inquiries into what other evidence of contact the applicant may or may not have possessed. This is particularly the case since the applicant was advised in a letter dated July 4, 2007 to bring to the interview evidence of contact with his spouse.

## CONCLUSION

[27] For these reasons, this application for judicial review is allowed, the decision of visa officer Hameed is set aside and the matter shall be sent back for redetermination by a different visa officer.

[28] Neither party considered that this case raised a question which ought be certified for appeal. The Court agrees.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that:**

1. This application for judicial review is allowed;
2. The decision of the visa officer is set aside; and
3. The matter is referred to another visa officer for redetermination after providing the applicant with an interview.

“Michael A. Kelen”

---

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4243-07

**STYLE OF CAUSE:** AGHA SHABBAR MUSTAFA a.k.a. SHABBAR  
MUSTAFA AGHA v. THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** April 22, 2008

**REASONS FOR JUDGMENT  
AND JUDGMENT:** KELEN J.

**DATED:** May 2, 2008

**APPEARANCES:**

Ms. Lisa Rosenblatt FOR THE APPLICANT

Mr. Michael Butterfield FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Lisa Rosenblatt FOR THE APPLICANT  
Barrister and Solicitor  
Toronto, Ontario

John H. Sims, Q.C. FOR THE RESPONDENT  
Deputy Attorney General of Canada